IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7215 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

KUNVARSINH @ JOKAR ARJUANSINH SOLANKI: Petitioner.

Versus

COMMISSIONER OF POLICE : Opponent.

Appearance:

MS DR KACHHAVAH for Petitioner

Mr. S.P. Dave, APP for Respondent No. 1, 3

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 18/11/97

ORAL JUDGEMENT

The petitioner, who is at present under detention pursuant to the order dated 7th April 1997 passed under Section 3(1) of the Gujarat Prevention of Anti-Social Activities Act, 1985 (hereinafter referred to as the `Act') by the Police Commissioner at Baroda, calls the said order in question preferring this application invoking the Article 226 of the Constitution of India.

2. The facts leading the petitioner to prefer the

application may in brief be stated. Against the petitioner, three cases were filed before the police; one complaint came to be filed in 1996 alleging that he committed the offences punishable under Section 395, 397, 201 of the IPC and Section 135 of Bombay Police Act; while lodging another complaint in 1997, it is alleged that the petitioner committed the offences punishable under Section 307 r/w. 114, IPC, using gupti. As per the allegation in the third complaint lodged in 1997, the petitioner is alleged to have committed the offence punishable under Section 392, 427, 504, 506(2) r/w. 114 of the Indian Penal Code. The Police Commissioner of the city of Baroda found that the petitioner was head-strong person and was carrying on nefarious activities endangering the safety of the public and he also found that maintenance of public order was jeopardised because of the nefarious activities of the petitioner. Hearing petitioner's name or seeing him people were feeling insecured. He then got recorded the statements of about four witnesses and got himself satisfied that detention of the petitioner was the only way out for maintenance of the public order as other remedial measures in law were sounding dull. He therefore passed the order on 7th April 1997 pursuant to which the petitioner has been now detained in jail. He challenges the legality and validity of that order.

3. The petitioner has no doubt raised several grounds in the case he has put forth in the application for assailing the order, but at the time of hearing before me, the learned advocate representing the petitioner submitted that she would confine to the only point going to the root. According to her, the names of the witnesses, whose statements were recorded and relied upon, ought to have been given to the petitioner so as to make effective representation. No doubt, under Section 9(2) of the Act, the authority making the detention order was vested with the power not to disclose the facts if it considered the same to be necessary in the public interest. According to the petitioner, no case for non-disclosure was made out and when the particulars about the witnesses were not supplied, the right to make representation effectively was injured and therefore the order in question was bad in law and was liable to be quashed.

4. It would be better if the law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention has been made are required to be communicated to the detenu

and further an opportunity of making the representation against the order of detention is required to be given. The detenu is therefore required to be informed not merely factual inference and factual material which led to inference namely not to disclose the certain facts but also the sources from which the factual material is gathered. The disclosure of sources would enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sourses would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act the detaining authority is empowered to withhold such facts and particulars the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has be exercised sparingly and in those cases where public interest dictating non-disclosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars of those persons the authority making the order has to make necessary inquiry personally. What can be deduced from such constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If he mechanically endorses or accepts the recommendation of an outside or inferior authority in that behalf the exercise of power would be vitiated as arbitrary. What is further required is the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is

filed the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power the other side may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference to a decision in the case of Bai Amina, w/o. Ibrahim Abdul Rahim Alla v. State of Gujarat and others - 22 G.L.R. 1186 held to be the good law by the Full Bench of this court in the case of Chandrakant N. Patel v. State of Gujarat & Others - 35 (1) [1994(1)] G.L.R. 761, may be made.

5. Keeping such law in mind, if the order in question is considered, I see no reason to maintain the order. At page 13, the reasons, assigned by the Police Commissioner are mentioned. Vide para 3 he has stated why he deemed it proper not to disclose the names and particulars of those witnesses. According to him, the disclosure would endanger the lives of those witnesses. However, what is noteworthy is that he has not personally inquired into the matter and satisfied himself about the apprehension of those witnesses. He has made it clear that, through the Assistant Police Commissioner `C' Division Baroda,he got the facts verified and going through the report he made he reached the conclusion that disclosure would endanger the lives of the witnesses. As per the law stated hereinabove, the authority passing the order for detention has to be satisfied, but in this case the Police Commissioner, who has passed the order, did not try himself for being satisfied so as to have justification about the order of non-disclosure. In this case, when exercise of the privilege under Section 9(2) for the aforesaid reasons appears to be unjust and improper, the petitioner was entitled to have the particulars withheld. For want of those particulars it was difficult for the petitioner to make effective representation. His right to make effective representation is, thus, marred. When that is the case, the order of detention cannot be maintained.

6. For the foregoing reasons, the order of detention being bad in law & unconstitutional, is required to be quashed. The same is accordingly quashed and the petitioner is hereby ordered to be set at liberty forthwith if no longer required in any other case. Rule accordingly made absolute.

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